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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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315 U.S. 871

No. 957

ALFONSE DOBRUSKY,

Petitioner,

vs.

STATE OF NEBRASKA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA AND BRIEF IN SUPPORT THEREOF.

BERNARD M. SPENCER,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of matters involved	1
Reasons relied on for the allowance of the writ	4
Prayer for writ	5
Brief in support of petition for writ of certiorari	7
I. Opinion of the court below	7
II. Jurisdiction	7
III. Statement of the case	9
IV. Specifications of errors	9
V. Argument	10
Summary of argument	10
Point A—Conflict with the provisions of the Constitution of the United States	10
Point B—Conflict with state court decisions	11
Conclusion	14

Table of Cases Cited.

Bramlett v. *State*, 129 Neb. 180, 261 N. W. 166	8, 13
Cole v. *Swan*, 4 G. Green, Ia. 32	8
Cooney v. *State*, 61 Neb. 342, 85 N. W. 281	8, 12
Gandy v. *State*, 24 Neb. 716	8, 11, 12
Hare v. *State*, 4 How. (Miss.), 187	9
Hoberg v. *State*, 3 Minn. 181	9
McClary v. *State*, 75 Ind. 261	8
Mattox v. *United States*, 146 U. S. 140, 36 L. Ed. 917, 13 Sup. Ct. 50	9, 14
People v. *Knapp*, 42 Mich. 267, 3 N. W. 927	8, 12, 13
Pickard v. *State*, 74 Ind. 275	8
Slaughter v. *State*, 24 Texas 410	9
State v. *Cartwright*, 20 W. Va. 34	9
State v. *Robinson*, 20 W. Va. 743	9
State v. *Scholl*, 118 Kans. 629, 236 Pac. 816	9
State v. *Simon*, 101 N. J. L. 11, 127 Atl. 570	8, 13
State v. *Snyder*, 20 Kans. 306	9, 13

Table of Constitutional Provisions Cited.

	Page
Fifth Amendment to the Constitution of the United States, U. S. C. A. Const., Part 2, p. 517	4, 10, 11
Sixth Amendment to the Constitution of the United States, U. S. C. A. Const., Part 2, p. 566	5, 11
Fourteenth Amendment to the Constitution of the United States, U. S. C. A. Const., Part 3, p. 334	5, 8, 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 957

ALFONSE DOBRUSKY,
Petitioner and Plaintiff in Error Below,

vs.

STATE OF NEBRASKA,
Respondent and Defendant in Error Below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

The petitioner was informed against in the District Court of Otoe County, Nebraska, on the 9th day of October, 1939, by the County Attorney of said County, charging the petitioner with the crime of manslaughter (R. 1). Thereafter on the 13th day of February, 1940, the petitioner pleaded not guilty to said charge (R. 2). Said cause was

called for trial in the District Court of Otoe County, Nebraska, on the 27th day of February, 1940 (R. 2) and said trial continued through the 28th of February, 1940, at which time the jury in said case in the District Court of Otoe County, Nebraska, retired for deliberation at 4:20 o'clock P. M. (R. 3). On the 29th day of February, 1940, at 9:15 o'clock A. M. the said jury returned a verdict into court finding the defendant guilty as charged in the amended information of the County Attorney (R. 3). On March 2, 1940, petitioner filed a motion for new trial in the District Court of Otoe County, Nebraska (R. 4-8), and on March 3, 1940, he filed an amendment to said motion for new trial in said court (R. 8-9). On April 13, 1940, the District Court of Otoe County, Nebraska, overruled the petitioner's motion for new trial and sentenced the petitioner to the Nebraska State Penitentiary at Lancaster, Nebraska, for an indeterminate period of one to three years (R. 11-12).

On April 13, 1940, the petitioner gave notice of appeal and notice of his intention to apply for a writ of error to the Supreme Court of the State of Nebraska (R. 9). There was entered by said District Court of Otoe County, Nebraska, an order for suspension of sentence and judgment to enable defendant to apply for a writ of error, which order was entered by the District Court of Otoe County, Nebraska, on the 13th day of April, 1940 (R. 10).

Said cause was by the Supreme Court of Nebraska ordered submitted to said Court on March 19, 1941 (R. 44) and afterwards on the 1st day of August, 1941, said Court affirmed the judgment of the District Court of Otoe County, Nebraska (R. 44), and on the same day said Supreme Court of the State of Nebraska filed an opinion in said case (R. 45-51).

On the 9th day of August, 1941, the petitioner filed his motion for re-hearing in the Supreme Court of the State

of Nebraska (R. 52-53). On the 17th day of November, 1941, the Supreme Court of the State of Nebraska overruled and denied a re-hearing in said case (R. 53).

Only the material part of the record is submitted to this Court. (See stipulation of Attorney General for the State of Nebraska, and attorney for respondent (R. 54-55)).

The principal question involved in said appeal to the Supreme Court of the State of Nebraska was as to whether the said petitioner had a fair and impartial trial by jury in the District Court of Otoe County, Nebraska, and that said trial constituted a violation of the petitioner's constitutional rights to a fair and impartial trial by jury, without interference of the deliberations of the jury by an outside person. It was affirmatively shown by the affidavit of Herman Spier, a member of the jury (Ex. "D") (R. 12) that George T. Johnson, the bailiff of the District Court of Otoe County, Nebraska, and the sworn officer in charge of said jury, remained in the presence of the jury and with the jury for a period of about five and one-half hours while the said jury was deliberating.

Said matter was presented to the District Court of Otoe County, Nebraska, in the petitioner's amendment to his motion for new trial (R. 8-9) by alleging misconduct of the jury and was especially called to the attention of the Supreme Court of the State of Nebraska in the petitioner's motion for re-hearing (R. 52-53) in the following words:

> "Because the court erroneously failed to consider or give effect to the fact that the bailiff George Johnson remained with the jury for approximately five and a half hours while the jury were deliberating this case; and because the court in its opinion and judgment makes no reference to said complaint of plaintiff in error, and has entirely disregarded this error of the case on review and for the reason that by said misconduct on the part of the bailiff and the jury, the

> plaintiff in error was prevented from having a fair trial and was prejudiced by such conduct."

Neither by its judgment or opinion did the Supreme Court of the State of Nebraska decide the said question brought to the attention of the court. It will be noted from an examination of the judgment of affirmance of the Supreme Court of the State of Nebraska, and from said opinion in said case that no reference whatsoever is made to said error, and in overruling petitioner's motion for re-hearing and denying the same the said Supreme Court refused to pass upon said question (R. 53).

This petition for a writ of certiorari is filed in this Honorable Court for the purpose of securing a review of the judgment of affirmance by the Supreme Court of the State of Nebraska and for a review of the opinion of the Supreme Court of Nebraska in connection with said judgment of affirmance of the District Court of Otoe County, Nebraska.

II.

Reasons Relied On for the Allowance of the Writ.

Petitioner says that the Supreme Court of the State of Nebraska is the highest court of law or equity in said State of Nebraska; that the judgment from which a writ of certiorari is applied for is a final judgment and presents Federal questions in this case, namely:

(a) The Fifth Amendment to the Constitution of the United States provides, in part, as follows:

> That no person shall "be deprived of life, liberty or property without due process of law." U. S. C. A. Const., Part 2, p. 517.

(b) The Sixth Amendment to the Constitution of the United States provides, in part, as follows:

> "In all criminal prosecutions, the accused shall enjoy * * * public trial, by an impartial jury of the

state and district wherein the crime shall have been committed." U. S. C. A. Const., Part 2, p. 566.

(c) The Supreme Court of the State of Nebraska decided against the petitioner and in violation of petitioner's constitutional rights, and particularly in violation of the following, the Fourteenth Amendment to the Constitution of the United States, providing, in part, as follows:

"* * * nor shall any state deprive any person of of life, liberty or property without due process of law". U. S. C. A., Const., Part 3, p. 334.

(d) Upon said question the highest courts of the States of Nebraska, Michigan, Indiana, Iowa, West Virginia, Kansas, Mississippi, Texas, Minnesota and New Jersey have reached a different conclusion from the Supreme Court of the State of Nebraska, and have held that where an outsider remains in a room with the jury during the time the jury are considering their verdict, prejudice to the accused is presumed and such action is sufficient to vitiate a verdict of guilty in a criminal prosecution, and from investigation made by petitioner's counsel, petitioner alleges and believes that said question has not been directly presented to or passed upon by this Court, but the Supreme Court of the United States, while not passing on the identical question involved herein, did cite and approve a case in the Supreme Court of the State of Michigan on the identical question in this case.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Honorable Court, directed to the Supreme Court of the State of Nebraska, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Supreme Court of the State of Nebraska had in the case numbered and entitled on its docket No. 30976, *Alfonse*

Dobrusky, Plaintiff in Error, v. *State of Nebraska, Defendant in Error,* to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and to the end that the judgment herein of said Supreme Court of the State of Nebraska be reversed by this Honorable Court, and for such other and further relief as to this Honorable Court may seem just and proper.

Dated February 3rd, 1942.

BERNARD M. SPENCER,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 957

ALFONSE DOBRUSKY,
Petitioner and Plaintiff in Error Below,

vs.

STATE OF NEBRASKA,
Respondent and Defendant in Error Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The opinion of the Supreme Court of the State of Nebraska is reported in — Nebr. —, filed August 1, 1941, 299 N. W. 593 (R. 80-89).

II.

Jurisdiction.

1. The date of the judgment to be reversed is August 1, 1941 (R. 44). The motion for re-hearing was overruled by the Supreme Court of the State of Nebraska on November 17, 1941 (R. 53).

2. The provisions of the Constitution of the United States which are believed to sustain the jurisdiction of this Court are:

U. S. C. A. Const., Part 2, p. 517; U. S. C. A. Const., Part 2, p. 566; and U. S. C. A. Const., Part 3, p. 334.

3. The specific claims of the petitioner in error raised in his motion for new trial (R. 4-9) on the specification that there was "misconduct of the jury" and upon his specification raised in his motion for rehearing (R. 52-53) that the bailiff of the court in the District Court of Otoe County, Nebraska, and who was the sworn officer in charge of the jury, remained with the jury for a period of about five and one-half hours while the jury was deliberating the case wherein the petitioner was accused of manslaughter which was prejudicial to the Constitutional rights of the petitioner and in this regard the Supreme Court of the State of Nebraska totally ignored petitioner's request for the review of this error and did not mention or discuss said error in its opinion filed on August 1, 1941 (R. 45-51) and petition contends that his Constitutional rights have been invaded by a failure of the Supreme Court of the State of Nebraska to review said question and reverse said case for a new trial because of said error.

4. The cases believed to sustain said jurisdiction are as follows:

Gandy v. *State,* 24 Neb. 716;
Cooney v. *State,* 61 Neb. 342; 85 N. W. 281;
Bramlett v. *State,* 129 Neb. 180, 261 N. W. 166;
State v. *Simon,* 101 N. J. L. 11, 127 Atl. 570;
People v. *Knapp,* 42 Mich. 267, 3 N. W. 927;
Pickard v. *State,* 74 Ind. 275;
McClary v. *State,* 75 Ind. 261;
Cole v. *Swan,* 4 G. Green, Ia., 32;

State v. *Cartwright,* 20 W. Va. 34;
State v. *Robinson,* 20 W. Va. 743;
State v. *Snyder,* 20 Kas. 306;
Hare v. *State,* 4 How. (Miss.), 187;
Slaughter v. *State,* 24 Texas 410;
Hoberg v. *State,* 3 Minn. 181;
Mattox v. *United States,* 146 U. S. 140, 36 L. Ed. 917, 13 S. Ct. 50;
State v. *Scholl,* 118 Kans. 629, 236 Pac. 816.

III.

Statement of Case.

This has already been stated in the preceding paragraph under I (pp. 1-4) of the petition for a writ of certiorari, which is hereby attached and made a part of this brief, which statement, in the interest of brevity, is not repeated at this point.

IV.

Specifications of Error.

1. The Supreme Court of the State of Nebraska erred in finding and holding that the judgment of the District Court of Otoe County, Nebraska, should be affirmed.

2. The Supreme Court of the State of Nebraska erred in refusing to determine that there was error in the trial of the petitioner in the District Court of Otoe County, Nebraska, when the bailiff of the court and the sworn officer in charge of the jury remained with the jury and in its presence for a period of five and one-half hours while the said jury was deliberating on the verdict in said case.

3. The Supreme Court of the State of Nebraska erred in overruling and denying the petitioner's motion for re-hearing where the question involved herein was specifically

brought to the attention of said Supreme Court of the State of Nebraska.

4. The Supreme Court erred in depriving the petitioner of his liberty without due process of law and in violation of the provisions of the Constitution of the United States.

V.

ARGUMENT.

Summary of Argument.

Point A. The decision below is contrary to and in conflict with the provisions of the Constitution of the United States.

Point B. The decision below is contrary to and in conflict with prior State court decisions.

Point A.

Conflict With the Provisions of the Constitution of the United States.

The uncontroverted testimony and evidence in this case is to the effect that the bailiff of the court and sworn officer in charge of the jury was with and in the presence of the jury for a period of about five and one-half hours during which time the jury were deliberating upon the verdict which was finally returned to the District Court of Otoe County, Nebraska.

The Supreme Court, by its refusal to pass upon this question, has approved this procedure.

The opinion and judgment of the Supreme Court of the State of Nebraska is contrary to the Constitutional provisions guaranteed to every person, including the petitioner, that he be not deprived of his liberty, without due process of law as guaranteed by the Fifth Amendment to the Con-

stitution of the United States of America, which provides in part as follows:

> "* * * nor be deprived of life, liberty or property without due process of law." U. S. C. A. Const., Part 2, p. 517.

The opinion and judgment of the Supreme Court of the State of Nebraska is contrary to the Constitutional provisions guaranteed to every person, including the petitioner, that he be not deprived of his liberty, without due process of law as guaranteed by the Sixth Amendment to the Constitution of the United States of America, which provides in part as follows:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. * * *" U. S. C. A. Const., Part 2, p. 566.

The opinion and judgment of the Supreme Court of the State of Nebraska is contrary to the Constitutional provisions guaranteed to every person, including the petitioner, that he be not deprived of his liberty, without due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America, which provides in part as follows:

> "* * * Nor shall any court deprive any person of life, liberty or property without due process of law." U. S. C. A. Const., Part 3, p. 334.

POINT B.

Conflict with State Court Decisions.

The case of *Gandy* v. *State*, 24 Neb. 716, 40 N. W. 302, opinion by Maxwell, J., laid down the rule and there has been no case to the contrary in said jurisdiction, that where

the bailiff remains in the room with the jury while the jury are considering their verdict, it is sufficient to vitiate the verdict.

The Nebraska court in the *Gandy* case followed *People* v. *Knapp*, 42 Mich. 267, 3 N. W. 927, holding that the officer in charge of a jury can not be present during the deliberation of the jury, although he may do nothing but listen.

The opinion in the *Knapp* case contains the following:

> "The presence of a single other person in the room is an intrusion upon this privacy and confidence, and tends to defeat the purpose for which they (the jury) are sent out; and if one may be present, why not several?" * * *
>
> "The only proper and just course is to insist on a rigorous observance of the proper practice in order to prevent all occasions for injurious suspicions." (Part in parenthesis ours.)

The court's attention is directed to the adherence of the Nebraska Court to the rule of *Gandy* v. *State*, 24 Neb. 716, 40 N. W. 302, in the later decision of *Cooney* v. *State*, 61 Neb. 342, 85 N. W. 281. In the *Cooney* case after trial and the case was given to the jury and while they were deliberating upon their verdict, the sheriff and bailiff having them in charge went with them to their room and remained with them for several hours. The trial court found that the sheriff and bailiff were in the back part of the room, which was quite large, and that the jury while deliberating and discussing evidence, were north of the center of the room; that neither of the court officers took any part in the deliberations, or advised the jury regarding their verdict. The trial court further found that the presence of the sheriff and bailiff did not influence the jury in reaching their verdict and refused to grant a new trial on the ground of misconduct. The Nebraska court in the *Cooney* case cites and

approves *People* v. *Knapp*, 42 Mich. 267, 3 N. W. 927 and which case was cited and approved in the *Gandy* case. Also with reference to the presence of an officer in the jury room, it is said in the *Cooney* case:

> "His presence was calculated to restrict discussion and freedom of action in the jury room, and the presumption that it was prejudicial to the defendant is not overthrown by the conclusion deduced by the trial court from the facts above stated."
>
> "It is claimed that the doctrine of Gandy *v.* State, supra, should not be applied to misdemeanor cases, but no reason for making a distinction between the two classes of cases has been suggested, and none is perceived. The judgment is reversed, and the cause remanded for the further proceedings. Reversed and remanded."

The case was reversed.

To the same effect is *State* v. *Snyder*, 20 Kas. 306.

In *State* v. *Simon*, 101 N. J. L. 11, 127 Atl. 570, it was held that the defendant was entitled to a new trial where the jury was turned loose in court room during the night, where general conversation and stories were indulged in, even though the officers were on the other side of the room. This conduct was held prejudicial to the defendant and he was granted a new trial.

> "The jury room is a place of seclusion and privacy for members of the jury while they are deliberating on their verdict." *State* v. *Scholl*, 118 Kan. 629, 236 Pac. 816, 818.

Justice Paine of the Nebraska Supreme Court said in the case of *Bramlett* v. *State*, 129 Neb. 180, 261 N. W. 166:

> "We are unwilling to lend encouragement to the lax conduct of a bailiff which, if tolerated, would undermine the purity and efficiency of our jury system."

For the misconduct of the bailiff in the *Bramlett* case, the judgment of the trial court was reversed and a new trial ordered.

The cases of other state courts hereinbefore cited are in accord with the discussion above set forth and hold that it is improper for any outsider to remain in a room with a jury during the time the jury are considering their verdict and that prejudice is presumed and that such is sufficient to vitiate the verdict.

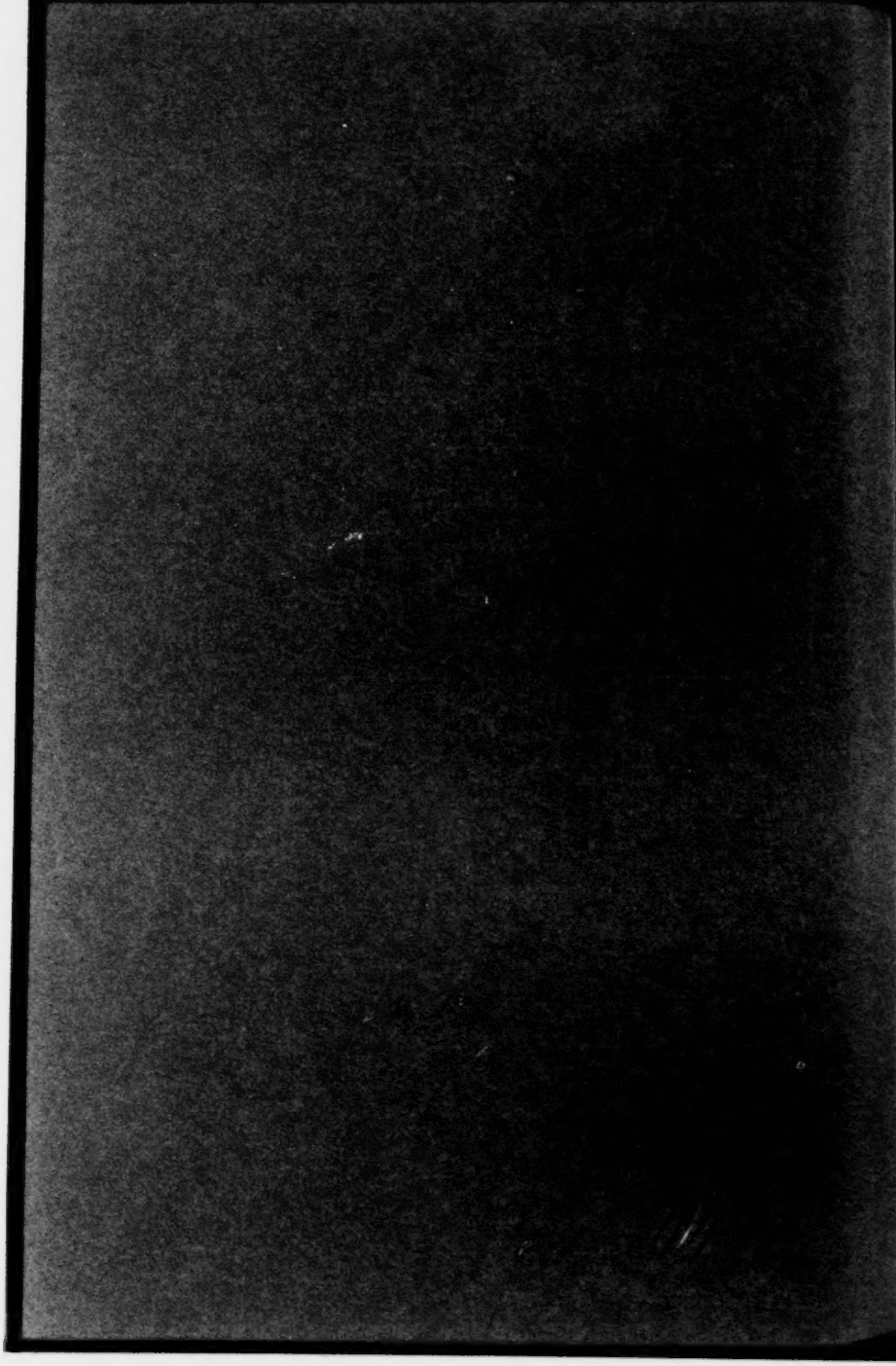
This Honorable Court's attention is directed to the case of *Mattox* v. *United States*, 146 U. S. 140, 36 L. Ed. 917, 13 S. Ct. 50, wherein Chief Justice Fuller incorporated in his opinion the following:

> "Indeed, it was held in People *v.* Knapp, 42 Mich. 267, that the presence of an officer during the deliberations of the jury is such an irregular invasion of the right of trial by jury as to absolutely vitiate the verdict in all cases without regard to whether any improper influences were actually exerted over the jury or not."

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and that this Court should review the decision of the Supreme Court of the State of Nebraska and finally reverse it.

BERNARD M. SPENCER,
Counsel for Petitioner.



SUBJECT INDEX.

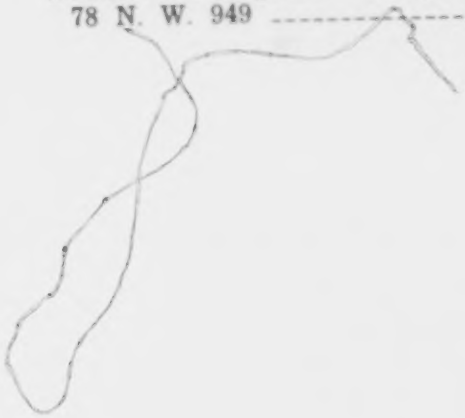
	Page
Nature and Statement of the Case	2
Summary of Points and Argument	2
Argument	2
Point A.—Where the Federal question is raised for the first time in the petition for the writ of certiorari in this court, it is raised too late, and insufficient to enable the Supreme Court of the United States to consider the question raised	2
Point B.—In ruling upon a motion for new trial based on alleged misconduct of the jury, the trial court's action is one of discretion and its ruling will not be disturbed unless an abuse of discretion is shown	6
Conclusion	16

Cases Cited.

	Page
Bolln v. State of Nebraska, 176 U. S. 83, 20 Sup. Ct. Rep. 287, 44 L. ed. 382	2, 4
Bramlett v. State, 129 Neb. 180, 261 N. W. 166	14
Chambers v. United States, 237 Fed. 513	6, 8
Cole v. Swan, G. Greene's (Ia.) 32	12
Cooney v. State, 61 Neb. 342, 85 N. W. 281	14
Cox v. Texas, 202 U. S. 446, 26 Sup. Ct. Rep. 671, 50 L. ed. 1099	2, 5
Gandy v. State, 24 Neb. 716, 40 N. W. 302	14
Hare v. State, 4 Howard (Miss.) 187	12
Hoberg v. State, 3 Minn. 262	10
Matters v. State, 120 Neb. 404, 232 N. W. 781	6
Mattox v. United States, 146 U. S. 140, 13 Sup. Ct. Rep. 50, 36 L. ed. 917	3, 9

INDEX—Continued.

	Page
McClary v. State, 75 Ind. 260	11
Montana ex rel Haire v. Rice, 204 U. S. 291, 27 Sup. Ct. Rep. 281, 51 L. ed. 490	2, 5
Murray v. State, 119 Neb. 16, 226 N. W. 793	6
People v. Knapp, 42 Mich. 267	13
Rickard v. State, 74 Ind. 275	12
St. Louis & S. F. R. Co. v. Shepherd, 240 U. S. 240, 36 Sup Ct. Rep. 274, 60 L. ed. 622	3, 5
Simmons v. State, 111 Neb. 644, 197 N. W. 398	6, 8
Slaughter v. State, 24 Texas 410	9
State v. Cartright, 20 W. Va. 32	9
State v. Robinson, 20 W. Va. 713	10
State v. Scholl, 118 Kan. 629, 236 Pac. 816	13
State v Simon, 101 N. J. L. 11, 127 Atl. 570	11
State v. Snyder, 20 Kan. 306	11
Williams v. Chicago & N. W. Ry. Co., 11 S. Dak. 463, 78 N. W. 949	6, 15



In The

SUPREME COURT OF THE UNITED STATES

October Term, 1941.

No. 957.

ALFONSE DOBRUSKY, PETITIONER,

V.

STATE OF NEBRASKA, RESPONDENT.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI.

WALTER R. JOHNSON,
Attorney General of Nebraska,

CLARENCE S. BECK,
Assistant Attorney General of Nebraska,
Counsel for Respondent.

To The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Your respondent respectfully shows:

That the petitioner in this case, Alfonse Dobrusky, is asking that a writ of certiorari issue out of this court to review a judgment of the Supreme Court of Nebraska affirming the conviction of the petitioner in the District Court of Otoe County, Nebraska.

NATURE AND STATEMENT OF THE CASE.

The statement contained in the petition for the writ filed in this court substantially sets forth the question involved.

SUMMARY OF POINTS AND ARGUMENT.

Point A.—Where the Federal question is raised for the first time in the petition for the writ of certiorari in this court, it is raised too late, and insufficient to enable the Supreme Court of the United States to consider the question raised.

Point B.—In ruling upon a motion for a new trial based on alleged misconduct of the jury, the trial court's action is one of discretion and its ruling will not be disturbed unless an abuse of discretion is shown.

ARGUMENT.

Point A.

Where the Federal question is raised for the first time in the petition for the writ of certiorari in this court, it is raised too late, and insufficient to enable the Supreme Court of the United States to consider the question raised.

This question has been decided by the Supreme Court of the United States in many cases, including the following:

Montana ex rel. Haire v. *Rice*, 204 U. S. 291, 27 Sup. Ct. Rep. 281, 51 L. ed. 490.

Cox v. *Texas*, 202 U. S. 446, 26 Sup. Ct. Rep. 671, 50 L. ed. 1099.

Bolln v. *State of Nebraska*, 176 U. S. 83, 20 Sup. Ct. Rep. 287, 44 L. ed. 382.

St. Louis & S. F. R. Co. v. *Shepherd,* 240 U. S. 240, 36 Sup. Ct. Rep. 274, 60 L. ed. 622.
Mattox v. *United States,* 146 U. S. 140, 13 Sup. Ct. Rep. 50, 36 L. ed. 917.

An examination of the record in this case discloses that in the motion for a new trial (R. 4) there is no allegation or claim that the constitutional rights of the defendant were violated. In the amendment to the motion for a new trial (R. 8) there is no allegation as to the violation of any of the defendant's constitutional rights and there is but the following statement contained therein as to the jury "misconduct of the jury." There is no other allegation in the amendment to the motion for a new trial with reference thereto. It is true that an affidavit was filed in support of this amended motion for a new trial in which one of the jurors purports to say (R. 12) that the bailiff, who was the sworn officer in charge of the jury, was in the jury room during the deliberation of the jury for a period of a little more than five hours. The record further discloses, however, that evidence was taken on this subject and the bailiff was examined, not only by the counsel for the State and counsel for the defendant, but the trial court examined the bailiff on the witness stand as to his activities (R. 36 to 44). It was on this state of the record that the court ruled on the motion for a new trial charging the jury with misconduct.

It is also true that the decision of the Supreme Court of Nebraska did not touch upon the claimed error as to the misconduct of the jury, and it is also true that this was called to the court's attention in the motion for rehearing filed in the Supreme Court (R. 52), but it is notable that no Federal question is raised by the allegations of the motion for rehearing, nor is any claim made

that his constitutional rights had been invaded. It is only now in his petition for a writ of certiorari, filed in this court, and for the first time, alleged that the constitutional rights of petitioner have been invaded in the trial of the prosecution against him. Under the decisions of this court in the cases cited herein, we believe that his contention now comes too late, for it is quite apparent that it is an afterthought, an attempt to now have his case heard again by the assertion of a violation of his rights known to him before, but not asserted at the time.

In *Bolln* v. *Nebraska,* cited above, the Supreme Court says:

> "We have repeatedly decided that an appeal to the jurisdiction of this court must not be a mere afterthought, and that if any right, privilege, or immunity is asserted under the Constitution or laws of the United States it must be specially set up and claimed before the final adjudication of the case in the court from which the appeal is sought to be maintained. It is true that this court has sometimes held that, if a Federal question appear in the record and was decided, or such decision was necessarily involved in the case, and that such case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review here; but such cases have usually, if not always, arisen under the 1st or 2d clauses of § 709, and have involved the validity of a treaty, statute, or authority exercised under the United States, or the validity of a statute or authority exercised under a state, where such statute or authority is alleged to be repugnant to the Constitution or the laws of the Untied States. (Columbia Water Power Co. v. Columbia Electric Street R. Light & Power Co., 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247.) In the case under consideration the right to a trial by jury is claimed

under the Constitution of the United States; but, as it was never set up or claimed prior to the decision of the supreme court of the state, it is too late to raise the question here."

And in *Cox* v. *Texas,* cited above:

"A Federal question, although referred to in the assignments of error in the state appellate court and in the Supreme Court of the United States, cannot be considered by the latter court on writ of error to the state court, where it does not appear that the state court dealt with the question, and it may have refused to do so on the ground that it was not raised in the trial court."

In *St. Louis & S. F. R. Co.* v. *Shepherd,* cited above, the court held as follows:

"A Federal question first set up and asserted in a petition for rehearing after the judgment in the trial court had been affirmed by the highest court of the state will not support the jurisdiction of the Federal Supreme Court on writ of error, where the petition was not entertained, but was denied, without passing on the Federal question thus tardily raised."

Also in *Montana ex rel. Haire* v. *Rice,* cited above, the court held the following:

"Raising the Federal question for the first time in the petition for a writ of error to a state court and in the accompanying assignment of errors is not sufficient to enable the Supreme Court of the United States to consider that question, even though another Federal question has been properly raised and brought up by the same writ of error."

Point B.

In ruling upon a motion for a new trial based on alleged misconduct of the jury, the trial court's action is one of discretion and its ruling will not be disturbed unless an abuse of discretion is shown.

Chambers v. *United States,* 237 Fed. 513.
Matters v. *State,* 120 Neb. 404, 232 N. W. 781.
Murray v. *State,* 119 Neb. 16, 226 N. W. 793.
Simmons v. *State,* 111 Neb. 644, 197 N. W. 398.
Williams v. *Chicago & N. W. Ry. Co.,* 11 So. Dak. 463, 78 N. W. 949.

In a consideration of this matter, the rule seems to be well stated in *Chambers* v. *United States,* cited above, in which it is said at page 521:

> "The opinions in these and other cases have been read and considered, and the conclusion is that the stronger reasons and the weight of authority sustain the rule that, where a motion for a new trial is made on account of communications to the jury during their deliberations, there is a rebuttable legal presumption that they were prejudicial to the moving party, that this presumption may in some cases be overcome by evidence, and that where competent evidence is offered it is the duty of the trial court to hear and consider it, and that when it does so, and decides the motion thereon, its decision is discretionary, and is reviewable by a federal appellate court for abuse of discretion only."

With that rule in mind when we examine the record in this case, we find that the point is raised by the filing of an affidavit of one of the jurors in which he states as follows:

> "Affiant further says that the deliberation of said jury continued in the regular jury room which is entered from the District Court room of Otoe

County, Nebraska, at the southeast corner of said court room; that thereafter about the hour of 12:30 A. M., on the morning of February 29, 1940, the said jury left the said regular jury room and thereafter remained in the District Court room of the District Court of Otoe County, Nebraska, until about the hour of 6 o'clock A. M., during all of which said time the said George Johnson, as bailiff of said court and sworn officer in charge of said jury remained in said District Court room in the presence of said jury."

This is after the jury had retired for deliberation and it appears from the evidence taken in the examination of this problem by the trial court that the jury deliberated in the regular jury room until about twelve o'clock, midnight, when they were taken to a restaurant for sandwiches and coffee. It appeared that the heat had been turned off in the building in the regular jury room in which they were deliberating and it was cold, so the bailiff permitted them to continue their deliberation in the District Court room. It appeared further that the bailiff closed the doors to the court room and occupied two chairs at the door. It was much warmer in the hall than it was in the court room and occasionally he would open the door to permit heat to go into the court room from the hall, but that at the times when the doors were so opened there was no one else about the building and that the jury was not actually engaged in deliberation or taking a vote. They were playing cards or other games and making a lot of noise. It is to be noted that in the affidavit filed by the juror it is not alleged or stated that any communication was had between the bailiff and any of the jurors. It is not stated in that affidavit that any effect was had by the presence of the bailiff on any member of the jury. The bailiff in his testimony positively denied talking to any of the jurors or making any

comment about the matter upon which they were deliberating and the only times that the doors were opened at all was for the comfort of the jury or to turn off the lights in the court room. From the testimony of the bailiff himself it appears that the statement contained in the affidavit of the juror is entirely misleading because the bailiff did not remain in the court room in the presence of the jury at any time. Even when the doors were opened to permit heat to go into the court room he remained outside of the door and not in the presence of the jury at all. It seems to us that the rule stated in *Chambers* v. *United States* is particularly applicable to this situation. Evidence was offered, both in support of the motion for a new trial and in opposition thereto, and the court after hearing the evidence and in the exercise of its discretion overruled the motion for a new trial. Then the only question presented is whether or not the trial court abused its discretion. The rule is well stated in *Simmons* v. *State*, cited above, as follows:

> "Whether a motion for a new trial in a criminal case, based on alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown."

This same rule is followed in the other Nebraska cases cited.

We do not believe there is any conflict of state court decisions, as asserted in the brief of the petitioner. The rule being what it is in Nebraska, each case involving the question is decided on its own merits and an examination of the cases cited by the petitioner in his brief discloses that a different situation existed in each of them and all of them disclose a far more fagrant violation of the privacy of the jury in its deliberation.

In the case of *Mattox* v. *United States*, cited in petitioner's brief, it appears that there was a flagrant violation of the privacy of the jury during its deliberation, by remarks made by the bailiff, and also the fact that newspapers outlining the case were permitted in the jury room. However, offers of proof of these facts by affidavit of some of the jurors was denied by the court and the Supreme Court laid down the rule that while the result of a motion for a new trial could not be reviewed by writ of error, yet, the exclusion of affidavits in passing upon the motion was an act that could be reviewed by the Supreme Court upon the question of their admissibility.

We have investigated the other cases cited by the petitioner and a comment here may assist the court in arriving at the proper holding of those cases.

Slaughter v. *State*, 24 Texas 410:

In this case the defendant relied on improper conduct of the bailiff in being with the jury during their deliberations. The court says in the opinion that there is nothing shown which would implicate the jury in any misconduct even though the bailiff was with the jury during their deliberation, and says:

> "Such violation of his duty, however, might be attended with circumstances that would render the jurors liable to the imputation of misconduct and be ground for a new trial, if it were such as to engender the opinion that the defendant had not received a fair and impartial trial."

The cause was reversed on other grounds.

State v. *Cartright*, 20 W. Va. 32:

> "On the trial of an indictment for a felony, after all the evidence has been heard by the jury, and

> they have been put in charge of the officer for the night, the said officer at the instance of some of the jury brings to the jury-room one of the principal witnesses for the prosecution, who was an active participant in the fight, which caused the indictment, to play the fiddle for the jury. Said witness came into said room and remained there with the jury and the officer for half an hour fiddling for the jury; and in response to an inquiry from a brother of said witness, who came to the jury-room, while said witness was in the room with the jury, said officer stated, that said witness was not in the room. Afterwards the jury heard the argument of counsel and returned a verdict of guilty. On a motion to set aside the verdict the jury and the officer file affidavits, that no conversation or communication was had between the jury and said witness touching the trial or in any manner whatever, and that the presence or conduct of said witness had no influence on their verdict; but the affidavit of said witness was not taken, nor was any excuse offered for not taking it. This was ground for setting aside the vervict (p. 44)."

State v. *Robinson*, 20 W. Va. 713:

In this case the question raised was as to the separation of the jury, and it seemed to be established that outsiders had contact with several of the jurors. This was sufficiently established by the testimony in the case, and in addition, newspapers had been given to the jurors, and various members of the jury had received sealed letters, and for this and other errors the case was reversed.

Hoberg v. *State*, 3 Minn. 262:

In this case misconduct of the jury was alleged, but the only proof furnished was that the District Judge who tried the case had visited and had communication with

them apart from the prisoner and his counsel. The Supreme Court criticized this conduct, but said that in this case there was no error in so doing. However, the case was reversed on other grounds.

State v. *Snyder,* 20 Kan. 306:

> "2. *Criminal Law; Deliberation of Jury; Presence of Officer.* After a verdict of guilty had been returned by a jury against an accused for the offense of obtaining by false pretenses the signature of a firm to a check of $850, and in support of a motion for a new trial affidavits were filed proving that the bailiff who had the jury in charge, and who had testified on the trial on the part of the prosecution to material facts against the prisoner, was with the jury in the jury-room the greater part of the time while they were deliberating on their verdict, and the state made no explanation of the presence of the officer with the jury in their consultations together, nor any showing that the rights of the prisoner were not prejudiced by the acts and conduct of such officer and witness, *held,* that the verdict should have been set aside and a new trial granted."

State v. *Simon,* 101 N. J. L. 11, 127 Atl. 570:

In this case, it seemed to be established that during the evening and while the jury were deliberating, they were turned loose in the court room in the presence of a number of court officers and free to discuss general topics with them, that there was a discussion of general topics, telling of stories, and other general conversation. For this and other errors alleged, the case was reversed.

McClary v. *State,* 75 Ind. 260:

In this case, the court held the affidavit filed in support of the claim of the presence of the bailiff in the jury room with the jury during their deliberation to

have been insufficient because it did not directly aver that the bailiff was in the jury room but only that after the jury were discharged, the bailiff told the affiant juror that he was in the jury room the greater portion of the time while the jury were in consultation, and held:

> "*Insufficiency of Affidavit.*—An affidavit, filed in support of a motion for a new trial on account of the misconduct of the jury, in permitting their bailiff to be present during their deliberations, which states 'that the bailiff told the affiant that he was in the jury-room the greater portion of the time while the jury were in consultation,' is insufficient to prove that the bailiff was in the room as alleged."

This case was affirmed.

Cole v. *Swan,* 4 G. Greene's (Ia.) 32:

In this case, it seems to have been established that the bailiff told the jury that they would be kept by the court from Saturday evening until Monday morning without anything to eat unless they would agree upon their verdict, and that in consequence of this, one of the jury consented that a verdict might be returned. The court held this to be error and the case was reversed.

Hare v. *State,* 4 Howard (Miss.) 187:

It was established in this case that after the jury had retired for deliberation under the charge of a sworn officer, that a stranger was permitted to go into the jury room and discuss facts of the case with them while the bailiff was absent getting some water for the jury. A new trial was granted.

Rickard v. *State,* 74 Ind. 275:

In this case, an affidavit was filed by one of the jurors that the bailiff, during the time the jury was deliberating, had access to their room and frequently passed in and

out thereof, and remained with the jury a large portion of the time while they were deliberating and considering their verdict. This affidavit was not controverted by the State, and the cause was reversed.

> "Under the statutes of this State, an officer having a jury in charge, either in a civil or criminal case, has no authority to speak to them, except to ask them if they have agreed upon a verdict, unless by order of the court, and he ought not in either case to be allowed to be present with the jury during their deliberations; his presence, even though he does not speak to the jury, and though it does not appear to have caused any injury, is sufficient to vitiate the verdict returned by the jury."

People v. *Knapp*, 42 Mich. 267:

In this case, it was established that when the jury retired to deliberate their verdict, the officer accompanied them and remained in the room during their deliberations. This fact was made known to the trial court in the motion for new trial, but on its being made to appear that the officer did not converse with the jury, the court denied the motion. This was held to be error by the Supreme Court with the rule:

> "A verdict in a criminal case may be set aside and a new trial granted if the officer who attended the jury remained in the jury-room during their deliberations."

State v. *Scholl*, 118 Kan. 629, 236 Pac. 816:

> "At the hearing on the motion for new trial it was shown that while the jury were deliberating the judge of the court went several times to the door of the jury room and conversed with the jury. On one occasion the judge had his head in the door of the jury room for several minutes. From a state-

ment made by the judge in denying the motion, it appears that nothing actually prejudicial occurred, and a majority of the court are inclined to apply the statute forbidding reversal unless substantial rights are materially infringed. The conduct exhibited was, however, highly improper. Throughout the proceeding in a criminal case the trial judge's place is on the bench. The jury room is a place of seclusion and privacy for members of the jury while they are deliberating on their verdict. The trial judge has no privilege to invade it, and all his communications with the jury ought to be in open court."

The conviction was affirmed.

Bramlett v. *State*, 129 Neb. 180, 261 N. W. 166:

In this case it was established that the bailiff went into the jury room and said to one of the members of the jury, who was holding out for acquittal, "What the hell is the matter with you, get busy," and to another, "You're not going to hold them back alone, are you?" and then said, "The judge will be here about 2 o'clock and then will be gone all afternoon." There was no evidence offered in opposition to the above and the court very properly held that the verdict of the jury should be set aside in such circumstances.

Gandy v. *State*, 24 Neb. 716, 40 N. W. 302:

In this case it appeared that the bailiff remained in the room with the jury during the time it was deliberating and the court held that it was sufficient to set aside the verdict of the jury.

Cooney v. *State*, 61 Neb. 342, 85 N. W. 281:

In this case it appeared that the officer who had given evidence in the case also had charge of the jury during

its deliberation and that he and the bailiff were in the same room with the jury during its deliberation, and the court very properly held that it was sufficient to set aside the verdict.

However, in *Williams* v. *Chicago & N. W. Ry. Co.*, 11 So. Dak. 463, 78 N. W. 949, it appeared that the bailiff was invited into the jury room where they were deliberating because it was cold and there was no fire in the part of the building where the bailiff was required to stay and that the bailiff went into the jury room and lay on the floor. He did not converse with any of the jurors, nor was any vote taken while he was present in the room, nor anything said about the case. As soon as he had warmed himself he left, and the court held that in the absence of any showing of influence or impression made upon any member of the jury that it was not misconduct sufficient to justify the granting of a new trial.

We quite agree with the general rule as heretofore stated in this brief and that even the presence of the bailiff, or any other person, in the room with the jury while it is deliberating is presumptively influential upon their verdict and certainly it violates the right of privacy of the jury, and undoubtedly impedes that free and untrammeled discussion of the evidence necessary in order that a verdict may be reached, but it is hardly conceivable that a jury may be instructed and retire to their jury room, deliberate for many hours, and then be returned to the court room without some contact with the bailiff. He it is who must escort them from the jury room to the restaurant in order that they may eat during their deliberation. He must return them to the jury room and if an emergency should arise wherein the assistance of a doctor was needed or one of a thousand other things might occur, certainly the bailiff may not

be charged with having violated the privacy of the jury by attending to the comforts thereof as the necessity arises. The same rule would seem to be that unless there is some showing which was sufficient to justify the court in finding that some influence had been brought to bear on the jury, either actual or presumptive, before the court could be said to abuse its discretion in overruling the motion for a new trial based upon that ground.

CONCLUSION.

We respectfully submit that the petition for the writ of certiorari should be denied, first, because the raising of the Federal question came too late, and, second, because there has actually been no invasion of the constitutional rights of the petitioner in the trial of his case or in its affirmance by the Supreme Court of Nebraska.

Respectfully submitted,

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